FOR ARGUMENT

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, et al.,

Petitioners,

-against-

PATRICIA ROBERTS HARRIS, Secretary, Department of Health, Education and Welfare, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

HEW restricts its argument in its brief to what it contends is the meaning of the expression "engages in discrimina-

tion" in Section 1605 (d)(1)(B).*

Accordingly, we limit our reply to that issue, relying on the Board's main brief

*20 U.S.C. §1605 (d)(I)(B) provides:

> No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972 -
>
> (B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility).

with respect to the other issues here presented.*

HEW states that its reading of this part of the ESAA legislation is "fully supported by the text of the statute and its legislative history" (Resp. Br. 11). HEW is incorrect on both points. Its reading of the statute overall is strained and contrary to the common meaning of the

*We will not reply at length to the suggestion in the Lawyers' Committee amicus brief that the petition for certiorari should be dismissed as improvidently granted (Am. Br. 8-10). Suffice it to say, the amicus misunderstands the facts of this case. At issue here is the teacher assignment policy in New York City high schools. The provision of state law (N.Y. Educ. Law §2590-j 5) addressed to increasing minority teaching staff in schools with low reading scores, discussed by the Lawyers' Committee (Am. Br. 9 n. 13), applies only to hiring in primary schools. Hiring in primary schools is under the direction of the Community School Boards and has no relevance to this case. See, N.Y. Educ. Law §2590-j; Pet. Br. 8 (footnote**).

language used. Its references to and quotations from the legislative history are incomplete and ignore the more relevant legislative history cited in our main brief.

1. HEW, as well as the Lawyers' Committee, argue that, because the expression "engages in discrimination" is preceded by the word "otherwise," which in turn is preceded by a test for ineligibility based upon "disproportionate demotion or dismissal" of minority staff members, concededly a test for ineligibility not requiring an intent to discriminate, "discrimination" as here used does not require intent. HEW and the Lawyers' Committee apparently suggest that "otherwise" means "in the same manner as" or "similarly."

In a proper context, e.g., where the doctine of ejusdem generis is applicable, "otherwise" might be so read. See generally, 2A Sutherland, Statutory Construction (4th ed.) § 47.17 et seq. But this is not its ordinary meaning.* And, in the context of this statute, where "otherwise" is not preceded by an enumeration of a number of types of improper conduct (compare id., §47.18), but rather is preceded by a description of a single type of highly particularized conduct, the sense of the statute is not of similarity, but of contrast. I.e.

*The dictionary defines "otherwise" to mean:

> 1. in a different way or manner: differently (he could not act [otherwise]) 2. in different circumstances: under other conditions ([otherwise] he might have won) 3. in other respects (weak but [otherwise] well).

Webster's Third International Dictionary (1961) (Unab.).

Section 1605(d)(1)(B) first prohibits, without regard to intent, disproportionate demotions or dismissals; then in apparent contrast to the first type of conduct, it also prohibits discrimination in the hiring, promotion, or assignment of staff.

Indeed, if it were not the intent of the statute to draw such a distinction, but rather to treat hiring, promotion and assignment in the identical way that demotions and dismissals are treated, the paragraph in question would be both clearer and shorter: it would simply treat these activities together, rendering ineligible any applicant whose practices or policies produced "disproportionate results" in any of these areas.

But it was clearly not the intention of Congress to treat in the

same way demotions and dismissals and questions related to hiring, promotions and assignments. This is indicated not only by the language of the statute, but also by its legislative history. Thus, the Senate Committee on Labor and Public Welfare stated in its report:

> The phrase "disproportionate demotion or dismissal of instructional or other personnel from minority groups" is not modified or in any way diminished by the subsequent phrase "or otherwise engaged in discrimination based upon race, color or national origin," which renders ineligible local educational agencies which have engaged in other discrimination, including discrimination in hiring, against minority group employees.

Sen. Rep. No. 92-61 p. 19, 92d Cong. 1st Sess. (1971) (emphasis added). See also, id. at 41; Pet. Br. 24-27. Here we see not only the firm distinction that Congress intended to be drawn between these two categories of ineligibility,

but, moreover, that the standard applicable where demotions and dismissals are in issue is more burdensome on applicants then the standard applicable to staff assignments.*

2. The next step in HEW's argument is to contend that the "general rule," the "pattern," for determining ineligibility under Section 1605(d)(1) is an effects test (or disparate impact) (Resp. Br. 15-16). HEW's basic premise in making this argument is that paragraphs (A) and (C) of Section 1605(d)(1),

*Congress singled out staff demotions and dismissals as appropriate for a disparate impact standard because of its finding that desegregation activities in the South had resulted in wholesale firing of black staff. See, Sen. Rep. No. 92-61 p. 18, 92d Cong. 1st Sess. (1971); Pet. Br. 26 (footnote). HEW's brief simply ignores this most relevant legislative history. We submit that this Court cannot ignore it; it tells eloquently what Congress had in mind in enacting the special provision for demotions and dismissals.

as well as the first part of paragraph (B), all incorporate an effects test, and thus, notwithstanding paragraph (D), which HEW concedes incorporates an intent test (Resp. Br. 16), the general rule of the statute is to apply an effects test.

Even if we were to accept HEW's assumptions that paragraphs (A) and (C) incorporate this burdensome test, we cannot comprehend how the question over staff assignments is thus resolved in HEW's favor. It is dubious logic indeed to conclude that the existence of an effects test in three out of five categories of ineligibility compels the

conclusion that it also exists in a fourth.*

Moreover, it is clear that paragraph (A) does not incorporate an effects test, and, although as to paragraph (C) the question is somewhat more complex, even here it is clear that effect alone would ordinarily not be enough to justify a finding of ineligibility.

Paragraph (A) was specifically intended by Congress to restrict ESAA eligibility only where transfers of property to private segregated schools are intentional:

*The five categories of ineligibility are: (1) transfers of property to private segregated schools (Section 1605 (d)(1)(A)); (2) disproportionate demotion or dismissal of staff (Section 1605(d)(1)(B)); (3) discriminatory staff assignments (Section 1605(d)(1)(B)); (4) discriminatory classroom assignments (Section 1605(d)(1)(C)); and (5) discrimination against minority children in school activities (Section 1605(d)(1)(D)).

> [I]t would provide that it has to be knowingly made or made with some kind of intent, because that was the purpose of Congress originally.

118 Cong. Rec. 5983, 92d Cong. 2d Sess. (1972) (remarks of Sen. Chiles). The Lawyers' Committee is in accord with the Board in this interpretation of paragraph (A) (see, Am. Br. 33-34).

With respect to paragraph (C), intent to discriminate is, again, at least as a practical matter, the cornerstone of an ineligibility finding. Under ESAP,* desegregation efforts had been frustrated by the creation of bogus ability groupings which were used to segregate students by race within desegregated schools. See, 117 Cong. Rec. 11728, 92d Cong. 1st Sess.

*Emergency School Assistance Program, P.L. 91-38, 84 Stat. 800 (1970), the predecesser to ESAA.

(1977) (remarks of Sen. Mondale). Paragraph (C) in its original form* was specifically addressed to overcoming this problem. As stated by Senator Pell:

> This language in the bill seeks to avoid ability grouping which is used as a guise or cover for segregation.

Id. at 11727. The proposed provision was nonetheless amended by the addition of another phrase* in order to put to rest any question that bona fide ability groupings resulting in segregated classes could trigger ESAA ineligibility. See, id. at 11727, 11178, 11729, 11730 (remarks of Sen. Ervin); id. at 11728, 11729 (remarks of Sen. Byrd); id. at 11730 (remarks of Sen. Mondale).

*Section 5(d)(1) of S. 1557 originally provided:

> No local educational agency shall be eligible for assistance under this act if it has, after the date of enactment of this act --
>
> (C) in conjunction with desegregation or the conduct of activity described in section 5 had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from non-minority group children for a substantial portion of the school day;

117 Cong. Rec. 11727, 92d Cong. 1st Sess (1971).

*The amendment provided:

> Provided, however, the foregoing does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

117 Cong. Rec. 11730, 92d Cong. 1st Sess. (1971). With the addition of this final phrase, the proposed subsection (C) is identical in pertinent part with the enacted provision.

Thus, under paragraph (C) the issue to be determined in every case involving separation of minority children, except where no justification is offered in terms of ability groupings, is the good faith of the applicant. Conceivably, it might be held that in determining this issue lack of educational justification for the ability grouping could be considered as evidence of bad faith, but still Congress has clearly indicated that the issue here is good faith (i.e., intent), not educational justification.

Contrary to HEW's reading of this statute, the dominant theme of ESAA, based upon its language and legislative history, is that an applicant may not be held ineligible except upon a finding that it engaged in some type of intentional dis-

crimination or conduct calculated to further discrimination.* Although we do not agree with HEW that the "general rule" or "pattern" of Section 1605(d)(1) furnishes a reliable guide to determining what Congress had in mind in using the words "otherwise engages in discrimination," it is enough to note here that HEW's "general rule" argument is manufactured out of whole cloth, and, if anything, supports the Board's reading of these words.

3. With respect to both HEW's and the Lawyers' Committee's reliance upon

*The inclusion of the intent standard throughout Section 1605(d)(1) effectively invalidates the Lawyers' Committee's argument that in order to permit "rapid, objective measurements" of ESAA applications, Congress intended disparate impact to be the general test for ESAA ineligibility (Am. Br. 3-4). Furthermore, we note that HEW has yet to advance this particular justification for applying a disparate impact standard in this case.

the Stennis amendment, we would be most brief. In addition to what we have said on this point in our main brief, we would observe that the undeniable, and even admitted, presence of intent tests in Section 1605(d)(1) simply cannot be squared with the Court of Appeals' and our opponents' view that Section 1602(a) mandates the application of a disparate impact or effects test in determining ESAA eligibility.

Moreover, in terms of the approach here taken by HEW of focusing so closely on the language of ESAA, to the exclusion of other indicia of legislative intent, it is significant that the Stennis amendment never uses the term "discrimination"; rather, it refers to "segregation whether de jure or de facto" (emphasis supplied). This difference is

critical; "discrimination" does not mean the same thing as "segregation whether de jure or de facto." As we pointed out in our main brief (Pet. Br. 27-30), and neither HEW nor the Lawyers' Committee ever really answers this, the Congress which enacted ESAA knew what it meant by the term "discrimination." It meant intentional discrimination in violation of the Equal Protection Clause, not including merely de facto segregation. The policy of the Congress expressed in the Stennis amendment to address the problem of segregation "without regard to [its] origin or cause" (Section 1602(a)), affords no warrant for ignoring the understanding of Congress when it used the term "discrimination" in Section 1605(d)(1)(B). That term in paragraph (B) clearly refers to actionable, de jure conduct. No amount of artful textual

analysis, or ignoring of the relevant legislative history, can alter this fact. This was the understanding and intent of Congress. That understanding and intent should, indeed must, be given effect.

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